STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION	)	
On its own motion	)	
	)	Docket No. 00-0596
Revise of 83 Ill. Adm. Code 730	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, March 14, 2002, we filed with the Chief Clerk of Illinois Commerce Commission the enclosed Reply Brief of the People of the State of Illinois and the Citizens Utility Board via e-docket to the Chief Clerk of the Illinois Commerce Commission at 527 East Capitol Avenue, Springfield, Illinois 62794-9280.

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Assistant Attorney General

CERTIFICATE OF SERVICE

I, Susan L. Satter, Assistant Attorney General, hereby certify that I served the above identified documents upon all active parties of record on the attached service list on March 14, 2002, by electronic mail to all parties. Paper copies will be available upon request.

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STATE OF ILLINOIS

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REPLY BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS

AND THE CITIZENS UTILITY BOARD

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March 14, 2002

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The People of the State of Illinois, by James E. Ryan, Attorney General and the Citizens Utility Board (CUB/AG) submit the following Reply Brief:

I. There Is No Evidence To Support Verizon's Proposal To Change The Out-of-Service Definition To Exclude Inability To Receive Calls.

Verizon argues that "there is simply no reasonable basis in the record to expand this definition [of out-of-service]" to include inability to receive calls. Verizon Ini. Br. at 10. Given Verizon's insistence that there is insufficient evidence to support many of the changes proposed by Staff and other parties in this docket, it is ironic that Verizon seeks to change the definition of out-of-service without any evidentiary support. In fact, Verizon's own evidence demonstrates that it has met the out-of-service standard for 30 months while including all out-of-service reports, including inability to receive calls. Verizon Ex. 3.0 at 2-3 (discussed in AG/CUB Ini. Br. at 3). Verizon's statement that "repair may be delayed in order to repair service to a customer who continues to have the ability to make calls" is irrelevant, because clearly Verizon has the ability to make repairs of 95% of its out-of-service conditions as defined by Staff within 24 hours as required by the rule.

Verizon characterizes the Staff definition of out-of-service as an "expansion." Yet, it is the same definition Verizon has used for years. Further, no other carrier has requested the limited definition of out-of-service requested by Verizon, demonstating that Verizon's claim to represent industry practice is spurious.

II. The Penalty Provision Advocated By CUB/AG Should Be Adopted By The Commission And The Limitations Proposed By Verizon And Illinois Bell Should Be Rejected.

Verizon and Illinois Bell both recommend that the penalty provision of the Part 730 rule, section 730.120, include conditions and limitations not found in section 13-712

of the Public Utilities Act. Verizon would import a part of section 13-304 mandating that the Commission consider a carrier's "diligence" despite the fact that section 13-712, which directly addresses service quality penalties, contains no such consideration. Compare 220 ILCS 5/13-712 (c) and 220 ILCS 5/13-304. Illinois Bell maintains that the rule should incorporate the credit limitations of section 13-305 despite the clear exclusion in section 13-305, which states that it applies only "in a case in which a civil penalty is not otherwise provided for in the Act."

CUB/AG agree with Staff that Verizon's suggestion should be rejected. Clearly, the Commission is free to consider a carrier's diligence or not consider it, as required by the situation. Staff Ini. Br. at 33-34. The only mandated considerations are those that the General Assembly wrote into section 13-712, and the Commission should neither diminish nor expand them in these rules.

Similarly, CUB/AG and Staff agree that the General Assembly did not require the Commission to limit its ability to impose fines and penalties for service quality problems. Section 13-712, adopted just last spring, specifically directs the Commission to promulgate rules "which may include fines, penalties, customer credits and other enforcement mechanisms." 220 ILCS 5/13-712 (c). Section 13-305 was adopted at the same time and only applies the civil penalty limitation to "cases in which a civil penalty is not otherwise provided for in this Act." 220 ILCS 5/13-305. Staff ultimately recognizes that the Commission retains the freedom to set appropriate fines and penalties without regard to the limitations of section 13-305 (Staff Ini. Br. at 34-36). CUB/AG maintain that, given the wide range of service quality problems and associated financial incentives (see CUB/AG Ex. 1.0 at 14), the Commission should not limit the power the

General Assembly gave it by importing an unnecessary and potentially counter-productive penalty cap.

Illinois Bell and Verizon point out that the Commission's authority is limited to that granted by the General Assembly. IBT Ini. Br. at 15; Verizon Ini. Br. at 4. Verizon goes a step farther, and suggests that, "[g]iven the passage of the new legislation amending the Act, the review of penalty mechanisms has effectively been rendered moot." Id. CUB/AG do not quarrel with the principle that the Commission's authority is set by the General Assembly. However, as pointed out above, the General Assembly in fact granted the Commission broad powers to assess fines and penalties. Section 13-712(c) requires the Commission to consider "the carrier's gross annual instrastate revenue" in setting the amount of a fine or penalty, as well as "the frequency, duration and recurrence of the violation; the relative harm caused to the affected customer or other users of the network … [taking] into account compensation or credits paid by the telecommunications carrier to its customers pursuation to this Section." 220 ILCS 5/13-712(c). The General Assembly clearly did not make the assessment of fines "moot" by adopting credit requirements, as suggested by Verizon. The Commission has the legislative authority and mandate to assess fines and penalties on a case-by-case basis.

Staff mentions that it included the reference to section 13-305 in the penalty provision in response to LECs' concern for certainty about the fine or penalty amounts. Staff Ini. Br. at 35. CUB/AG maintain that it is predictable that the LECs would want to limit their exposure to fines and penalties for service quality problems. However, this is no reason to circumvent or limit the plain grant of authority contained in section

13-712(c) to assess fines and penalties based on the specific factors contained in that section, including the carrier's gross annual intrastate revenue. If the General Assembly had meant to limit carriers' exposure to fines and penalties for service quality problems, it would have done so.

III. Staff And Illinois Bell Fail To Justify The Distortions To The Reported Data Inherent In Calculation Methodologies That Treats Excluded Situations As Though They Were Repaired or Installed On Time.

A. The Explanation Given For Counting Late, But Excluded Repairs As Timely Does Not Justify Distorting The Data, And Should Be Rejected.

There is no dispute that the calculation methodology recommended by Staff for reporting out-of-service conditions will treat certain outages as repaired on time regardless of whether or when they are in fact returned to service. IBT Ini. Br. at 20-21; Staff Ini. Br. at 66. Illinois Bell and Staff justify this distortion in the reported data on the grounds that the existence of outages that fall within an exclusion, e.g., emergency situations, will "increase the likelihood that the carrier may fail to meet other service quality standards, since it would have less technical personnel to address those situations than it would under normal circumstances." Staff Ini. Br. at 67; IBT Ini. Br. at 21. However, as Ms. TerKeurst pointed out: "Many of the service quality measurements already provide exclusions to eliminate the effect of extraneous situations or extraordinary demands on the carrier's resources, e.g., emergency situations or lack of access to the property (see sections 730.535, 730.540 and 730.545)." CUB/AG Ex. 2.0 at 12. CUB/AG maintain that the six exclusions specified in the rule (sections 730.535 (b) and 730.540 (f)) and written into the law (220 ILCS 5/13-712(e)(6)) are intended to allow carriers to take more time for repair or installation under certain circumstances without

reducing the carrier's overall service quality obligations or performance. However, under the Staff calculation methodology, excluded situations are being used to justify a higher percentage of untimely repairs or installations for the remaining customers. This occurs because repairs that should be excluded and that predictably will be late (no access, problem with CPE, willful or negligent act of the customer, and emergencies) are treated as repaired on time, allowing the carrier to repair fewer than 95% of the remaining out-of-service conditions, but report 95% as repaired on time.

Staff's calculation methodology for reporting out-of-service conditions should be rejected because it is inaccurate and degrades the standard without any evidentiary basis.

B. An Installation Report Calculation Methodology Should Be Described In The Rules To Avoid The Problems Identified With The Out-of-Service Calculation.

Staff opposes including a detailed calculation methodology for reporting the percentage of timely installations under section 730.540(f) on the ground that it is not necessary. Staff Ini. Br. at 74. However, the discussion in CUB/AG's Initial Brief and above about the out-of-service calculation applies to installations as well. Clearly there is an ambiguity about what should and should not be included in the numerator and the denominator to calculate the percentage of timely installations, just as there is a dispute regarding the calculation of the out-of-service percentage.

The percentage of timely installations should be calculated by taking all installation requests, removing the exclusions listed in section 730.540(f), and then dividing the number of remaining installation that are late by the total number of remaining installations. See CUB/AG Initial Brief at 14. This would allow the Commission and the public to insure that installations that are not excluded are installed

on time. Staff's approach, by treating excluded installations as if they were timely, distorts the result.

As discussed in CUB/AG's Initial Brief, the effect of Staff's calculation methodology is to degrade the existing installation standard. The existing rule contains fewer exclusions to the installation standard. As a result, installations that fall within the new exclusions presumably account for at least some of the 10% of installations that can be late under the current rule. If those installations are treated as if they were timely, more customers whose installations do not fall within an exclusion may experience late installations, although the reports the Commission sees show the carrier maintaining a 90% timely installation rate.

In conclusion, CUB/AG request that section 730.535(b)(2) and section 730.540 (c) both include a calculation methodology that fairly and accurately counts repairs and installations that are subject to the relevant time requirements, and excludes those repairs and installations that the rule and the law exclude from time requirements. See CUB/AG Initial Brief at 11, 14. The Commission established consistency in reporting as a key goal of this proceeding, and adopting the calculation methodologies recommended by CUB/AG will enable the Commission to meet that goal.

IV. Establishing A Standard And Reporting For Missed Appointments, Installation Trouble And Repeat Trouble Is Not Burdensome And Is Consistent With The General Assembly's Intent.

Verizon asserts that CUB/AG have proposed a "myriad of new reporting requirements." Verizon Ini. Br. at 2, 11. This is overstatement at best. CUB/AG have recommended that carriers' report the percentage of kept repair and installation appointments, and that the percentage similar to the existing standard for missed "commitments" be used as the standard (90% kept). CUB/AG Ex. 1.0 at 21-22; CUB/AG Ex. 3.0 at 10 ("Verizon does not recognize that the rule currently in effect already has a 10 percent benchmark for installation commitments.") Given the general nature of the word "commitment" and the more specific definition of appointment in the Part 730 and 732 rules and section 13-712 of the PUA, the replacement of commitments with appointments should be seen as an improvement over the existing rule and as furthering the Commission's goal to make the rules more effective and more consistent.

Verizon also complains that CUB/AG have proposed that the trouble report standards (trouble, repeat trouble and installation trouble) be changed. What Verizon does not mention, however, is that CUB/AG based their recommendations on carrier's actual performance. Despite Verizon's often stated concern about the level of evidentiary support for rule changes, on this issue Verizon would ignore evidence of improved performance in its opposition to any change. The CUB/AG proposed standard directly responds to the Commission's goal of adopting a more stringent standard when appropriate. Verizon's opposition to the "myriad of new reporting requirements" should be disregarded for what it is: hyperbole.

V. IITA And Verizon's Position That Service Quality Monitoring And Reporting Have No Public Value Has Been Rejected By The General Assembly And Should Be Given No Weight Here.

Verizon and IITA argue that there is no evidence of any public value from the monitoring required by the Part 730 rules, and that any burden resulting from the rules outweighs the value of them. Verizon Ini. Br. at 5-7; IITA Ini. Br. at 2.

Verizon repeatedly stresses that service quality performance is not an issue for it, and that it has met or exceeded existing benchmarks for the past several years. Verizon Ini. Br. 1-7. It argues that there is no general service quality issue for the Commission to address, and that recent problems have been specific to a single LEC. Id. Although CUB/AG do not dispute that Verizon's reporting shows adequate service quality, their specific record does not justify or support an argument to leave the current rules untouched. As the initiating order makes clear, this rulemaking was intended to address and head-off potential problems that were illustrated by the problems of one LEC, such as inconsistent reporting and inadequate definitions and standards. Further, the General Assembly, in enacting HB 2900, did not limit its requirements to a single LEC or to a LEC operating under an alternative regulation plan, which it certainly had the power and knowledge to do. Compare 220 ILCS 5/13-712 with 5/13-502.5.

The testimony and briefs in this docket demonstrate that there is still ambiguity and inconsistencies to be wrung out of the Part 730 rules. For example, the definition of out-of-service and reporting of out-of-service and installations are still not matters of consensus even after numerous workshops. See CUB/AG Ex. 3.0 at 6. This docket represents the Commission's well-advised effort to address these issues before another crisis strikes.

In response to Verizon and IITA's argument that there is no benefit from the adoption of the various standards and reporting rules proposed in this docket, CUB/AG direct the Commission to the testimony of Staff witnesses Samuel McClerren and Alcinda Jackson and CUB/AG witness Charlotte TerKeurst. Mr. McClerren pointed out that competition in the residential market is "extremely weak" and that "the 'invisible hand' of the marketplace cannot be counted on to regulate the service quality of the market as it is." ICC Staff Ex. 6.0 at 4. He also pointed out that monthly exception reporting will alert the Commission and the carrier to an emerging problem, and enable them to address the problem promptly, possibly preventing further deterioration. ICC Staff Ex. 3.0 at 6. CUB/AG witness Ms. TerKeurst agreed that it is preferable to monitor carriiers so that carriers know what is expected of them and provide acceptable levels of service before consumers are harmed and an after-the-fact review is required. CUB/AG Ex. 3.0 at 12. Ms. Jackson offered evidence on the value of quarterly reporting, noting that publicly available reports can be used by consumers to assess carriers performance in a competitive environment, as a marketing tool by carriers, and can act as an incentive to the carriers to provide quality service to impress the public. Although Verizon and IITA may not like reporting and monitoring, and it is inaccurate to say there is no evidence on their value in this record.

VI. The Commission Should Adopt Staff's Proposal To Specify A Date When External NIDs Are To Be Installed.

In their Initial Briefs, Illinois Bell and IITA object to Staff's proposed language for Section 730.335, which addresses carriers' installation of Network Interface Devices

("NIDs"). CUB/AG support Staff's language on this issue. The Commission clearly addressed the importance of installing NIDs in 1987 and 1995, and set a distinct timeline for Illinois telecommunications carriers. Prior Commission orders imposed a December 31, 2002 deadline for all carriers to install NIDs outside the premises of all one- and two-line customers. ICC Docket No. 86-0278 (Third Interim Order, Sept. 1987); ICC Docket No. 94-0431(July 6, 1995 Order). The most reasoned approach now is to specify the date that external NIDs must be installed statewide.

Illinois Bell and IITA argue that it would be cost-prohibitive to comply with a December 31, 2002 deadline for installing NIDs. IITA Ini. Br. at 2; IBT Ini. Br. at 12. Both Illinois Bell and IITA currently install new external NIDs only during new service installations or repairs. IBT Ini. Br. at 11; IITA Ini. Br. at 3. IITA claims that this approach "eases the financial burden of installing the NIDs by allowing the carriers to efficiently manage the associated costs over time." IITA Ini. Br. at 3. However, if the members of IITA had been performing NID installations over the last 15 years, as required by the Commission's 1987 and 1995 Orders, the burden, having been spread over a 15 year time frame, would be significantly reduced by now. The tremendous burden discussed by both Illinois Bell and IITA is of their own making.

Illinois Bell has wholly failed to provide an explanation for why it has not taken the appropriate steps over the last 15 years to comply with the 2002 deadline, and further has admitted that it does not currently intend to comply with the Commission's NIDs deadline. Tr. at 118. Indeed, Illinois Bell goes so far as to threaten that ubiquitous NID installation "could also impair performance with respect to more fundamental aspects of service quality." IBT Ini. Br. at 12. This thinly veiled threat rings hollow considering

that Illinois Bell has been on notice of the Commission's NIDs requirement for nearly fifteen years.

As stated in our Initial Brief, CUB/AG maintain that NIDs are not only an important technological improvement to facilitate effective competition, but also provide important safety and quality protections. Despite Illinois Bell's unsubstantiated claim that "from a customer's perspective, an additional, unsolicited premise visit is viewed by many customers as inconvenient and an invasion of their privacy," (IBT Ini. Br. at 12), if NIDs were installed externally, there would be little inconvenience to the customer at the time of installation and a real benefit to the consumer later if the consumer changed carriers or experienced inside wiring or other service problems. CUB/AG Ex. 2.0 at 9. Only in the event that an internal NID was present would the customer absolutely need to be present for the installation of the external NID. It is in the public interest for the Commission to uphold its 1987 and 1995 Orders, requiring NID installation by the end of 2002, by including Staff's proposed language in the rule.

The evidence in this docket shows, moreover, that the proper installation and associated grounding of NIDs could prevent someone from being electrocuted. Tr. at 537. Grounding could also prevent electrical shock or damage to electrical and computer equipment. Id. Furthermore, the presence of a NID provides customers with the ability to diagnose a service outage and determine whether the problem relates to the network or inside wiring. CUB/AG Ex. 2.0 at 7. In the absence of a NID, "a customer must go to the trouble and delay of arranging a premises visit to determine where the problem lies." Id. Additionally, without a NID and the resulting diagnostic ability, a customer may be more likely to incur the unnecessary cost of purchasing Illinois Bell's inside wire

maintenance plan or paying the LEC to perform inside wiring work, which is unregulated and supposed to be competitive. Id. at 8. It is therefore in the public interest for the Commission to uphold its 1987 and 1995 Orders, requiring NID installation by the end of 2002, by including Staff's proposed language in the rule.

The proposal to exclude internal NIDs from the rule should therefore be rejected, and Staff's proposed section should remain in the rule unchanged.

VII. The Payphone Exclusion in Section 730.535(b) Should Remain "Condition Caused by Payphone Equipment"

Verizon argues that the definition of variable "d" in Section 730.535(b) should be modified from the current proposal, "condition caused by payphone equipment," to read, "condition caused by payphones." Verizon Ini. Br. at 16. CUB/AG agree with Staff that Verizon's proposal to modify the reference to "payphone equipment" in Part 730.535(d) should be rejected. The exclusion as currently drafted by Staff reflects the basic principle that a payphone provider should have its loops repaired within 24 hours, just like any other customer. Staff Ini. Br. at 66; Staff Ex. 3.0 at 15. Payphones are important for certain segments of the population and should not be out of order longer than other lines. Although Verizon claims that, "trouble related to payphones is found to be in the customer-owned instrument rather than the line a higher percentage of the time," (Verizon Initial Brief at 17), these out-of-service conditions are already excluded under the provision that excludes out-of-service caused by payphone equipment. See section 730.535(b)(2)(variable d). The problem Verizon identified is already accommodated in the rule, and its proposal should therefore be rejected.

VIII. The Definition of Emergency Situation Should Be Consistent with the Definition in Part 732 or Should Not Mention Work Stoppages At All.

Both Illinois Bell and Verizon argue that the definition of "emergency situation" in the current Part 730 rulemaking should include "a strike or other work stoppage." IBT Ini. Br. at 16; Verizon Ini. Br. at 9. Illinois Bell contends that: "Collective bargaining and labor laws should govern the context of labor negotiation, not an administrative rule regarding service quality." IBT Ini. Br. at 17. IBT's position is premised on the assumption that "a labor union which might otherwise accept a good faith contract offer might instead stop work for more that seven days, simply to gain the artificial leverage stemming from exceeding the seven-day limit." Id. However, as pointed out in our Initial Brief, "No party has introduced any factual evidence showing the effect of strikes or work stoppages or the effect of concerted labor actions on the carriers' ability to provide quality service." CUB/AG Ini. Br. at 29. Expanding the definition of "emergency situation" to include issues relating to a labor dispute could just as easily result in strengthening that the company's position over the labor union, because the company "would not be liable for service degradation due to the strike or work stoppage." CUB/AG Ini. Br. at 30. Although the seven-day limitation written into the rule was an effort to give the carriers some relief in a work stoppage situation, a fair alternative to the seven day rule is to keep work stoppages out of the customer credit equation altogether, and eliminate it from the definition of emergency situation.

Illinois Bell cites federal law regarding the collective bargaining process, and suggests that certain federal legal doctrines would be violated "by the inclusion of an artificial limitation on the duration of a strike or other work stoppage within the definition of 'emergency situation' in Staff's proposal." IBT Ini. Br. at 19. Illinois Bell argued

that federal labor law mandates that the ICC include strikes and work stoppages, no matter how prolonged the strike or work stoppage, in the definition of emergency situation. IBT Ini. Br. at 17. Illinois Bell suggests that, because there is a general preemption against states interfering with labor disputes, the Commission must include strikes in the definition of emergency situations. Id. at 19. Ameritech's interpretation of labor law and reasoning is faulty.

Illinois Bell relies on the United States Supreme Court case, San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), for the proposition that the Commission is required under federal law to inlcude strikes and work stoppages in the definition of emergency situation. Illinois Bell misconstrues the Garmon holding to be more expansive than it is. Garmon prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986). Illinois Bell ignores the proposition that a regulated activity is not preempted if it is (1) merely of peripheral concern to the federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility. Belknap, Inc. v. Hale, 463 U.S. 491, 498 (1983) citing Garmon, 359 U.S. at 243, Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 200, and Farmer v. Carpenter, 430 U.S. 290, 296-297.

Under the Garmon test, strikes need not be included or excluded from the definition of emergency situation because the matter of local telephone service quality is, at best, merely of peripheral concern to labor issues. The proposed rule focuses on local telephone service quality, and does not in any way regulate or seek to regulate labor affairs. Further, matters of local telephone service are distinctly local concerns. Given

the recent public uproar and legislative concern with regard to the quality of telephone service in Illinois and the long-standing state responsibility for the regulation of local telephone service, this is clearly a matter deeply rooted in local feeling and responsibility. Garmon provides no support for the carriers' proposition that the definition of an emergency situation must include strikes or work stoppages.

Illinois Bell further opines that the exclusion of work stoppages is "accepted commercial practice" and is "often included in contracts," and therefore should be included in the Part 730 rule. IBT Ini. Br. at 17. Illinois Bell provides two examples of such contracts, an interconnection agreement and a coal contract, to further elucidate its point. Id. at 18. However, these examples fail to recognize the marked difference between a contract consented to by two sophisticated corporations, and basic service quality standards for a service of public necessity. Public interest dictates that basic phone service be available to every citizen. See 220 ILCS 5/13-103(a). The simple fact that the Commission approved the inclusion of "strikes" in the definition of "force majeure" for one gas pipeline company is totally irrelevant to the situation at hand. IBT Ini. Br. at 19, citing Illinois Gas Transmission Co. and Nuevo Energy Co., Ill. C.C. Dkt. 98-0510, App. B at § 12.2 (Sept. 28, 1999). First, this case is easily distinguishable on the basis that the lack of personnel for a gas pipeline company could very well result in a serious public safety issue - if not an all out disaster – which is clearly not a concern relative to phone service. Second, the Commission's discretionary approval in that instance does not provide sufficient evidence or persuasion to do the same here. The Commission must make a reasoned and prudent decision based on the totality of the evidence. The evidence presented in the instant docket demonstrates that strikes and

work stoppages should not be included in the definition of "emergency services," or at the most, should be treated in a manner consistent with the Part 732 definitions.

CONCLUSION

For the foregoing reasons and the reasons stated in CUB/AG's Initial Brief, CUB/AG request that the Commission adopt the Part 730 as proposed by the Citizens Utility Board and the People of the State of Illinois.

Respectfully submitted:

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